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Court : National Consumer Disputes Redressal Commission NCDRC

Decided On : Mar-01-2012

Judge : V.B. Gupta, Presiding Member & the Honourable Mr. Vinay Kumar, Member

Appeal No. : FIRST APPEAL NO.453 OF 2009 Alongwith I.A. No.-- of 2009 (For condonation of delay) AND FIRST APPEAL NO.454 OF 2009 Alongwith I.A. No.--- of 2009 (For condonation of delay) in Complaint Nos. 139 & 140 of 2006

Appellant : Nitin Mehta, Builder and Developer Managing Director and Others

Respondent : Prashant Kumar Vijay Kumar Jain and Another

Advocate for Def. : Mr. Francis Paul

Advocate for Pet/Ap. : Mr. Deepesh Joshi

Judgement :

MR. JUSTICE V.B. GUPTA, PRESIDING MEMBER

Appellants herein, who were opposite parties before the State Commission, have filed these appeals which arises out of identical orders dated 8.4.2008, passed by State Consumer Disputes Redressal Commission, Maharashtra (for short as State Commission). Alongwith these appeals, applications for condonation of delay have

also been filed.

2. It would be pertinent to point out that respondents (who were original complainants) had earlier challenged the above impugned order, in First Appeals No. 245 and 246 of 2008, which were disposed of, vide order dated 16.7.2009, by this Commission.

3. With advantage, facts as well as decision of First Appeals No. 245 and 246 of 2008 are reproduced as under;

œThe original complainants before the State Commission have filed these appeals against the order dated 8.04.08 passed by the Maharashtra State Consumer Disputes Redressal Commission, Mumber (in short the State Commission) in complaint case nos. 139 and 140/08. The complaints before the State Commission were filed alleging deficiency in service on the part of the opposite party builder on several counts, viz, that after receipt of the substantial amount, i.e., more than 50% of the sale consideration of the apartment, the builder failed to execute the registered agreement which is mandatory as per the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 and that the construction was stopped and later on resumed but possession of the apartments was not given to the complainants. The prayers made in the complaint were for the directions to the opposite party builder to execute the mandatory agreement and to hand over the possession of the envisaged flats in the Benzer Tower. It would appear that despite the service of notices on the complaints, the opposite parties chose not to defend the complaints and they were, therefore, proceeded ex parte and the complaints were allowed by the State Commission with the following directions :-

1. Complaint is partly allowed.

2. O.Ps are directed to hand over peaceful possession of flat no.1703 on 17th floor and flat no. 1803 on 18th floor in B wing of Benzer Tower CTS No. 167-A, Western Express Highway, Boriwalli (E), Mumbai to the complainants together with interest @ 9% p.a. for delayed possession from the date of respective payments till handing over possession of the flat to the complainants.

OR

3. In the alternative, OPs are directed to pay to the complainants a sum of Rs.4,40,000 in complaint No.139/08 and Rs.6,40,000/- in complaint no. 140/08 along with interest @ 18% from the date of respective payments till realization to the complainants.

4. OPs are also directed to pay Rs.50,000/- as compensation for mental agony to the complainants and cost of Rs.5000/-.

5. OPs shall comply the above order within 30 days from receipt of the order. œ

2. Though the reliefs granted to the complainants can be said to be in consonance with the prayers made by them in the complaints but the grievance of the appellants appears to be that the State Commission ought not to have granted the alternative relief as appearing in (3) above. In any case, the prayer is that the alternative relief is not in commensurate with the loss and injury suffered by the complainants, because there has been steep escalation in the prices of the flats in the city of Mumbai/Greater Mumbai and the complainants need to be compensated as per the market value at which they can acquire the similar flats on the failure of the opposite party to give the booked flats.

3. We have heard Mr. Deepesh Joshi, learned counsel for the appellant and Mr. Francis Paul, learned counsel for the respondents and have given our thoughtful consideration to their respective submissions.

4. During the pendency of the present appeals, the learned counsel for appellants had brought to the notice of the Commission that the envisaged flats were on the verge of completion and lying unallotted and un-occupied by any third party and, therefore, relief may be confined to the main prayer of handing over of the possession of the reserved flats. On the other hand, it is pleaded that due to the default of the appellants in remitting the balance amount after 2001, the respondent builder had terminated the agreement and had allotted the flats to third parties sometime in 2002-03 and since third party interest has been created it is not possible for the respondent to hand over the possession of the said flats. Parties have filed certain documents in support of their respective pleas. From the

side of the appellants, statement of one, Alpesh Desai, Sales Executive of the Opposite Party builder, made by him in the Court of Special Judge, Bhopal, has been filed. In the said statement it is stated that the constructions of the above numbered two flats allotted in the names of the appellants is in progress and allotment has not been made to any one. Therefore, it appears to be far fetched for the respondents to contend that they had terminated the agreement in 2002 to 2003 and allotted the said flats to third parties. Even if it is so, this is a question which requires to be established by leading evidence when it comes to the execution of the order passed by the State Commission.

5. So far as the contention of the Learned counsel for the appellants that the appellants are entitled to higher alternative relief than what has been granted to them, he has relied upon the judgment delivered by the Honble Supreme Court in the case of **Nirmala Anand Vs. Advent Corporation (P) Ltd. and Ors. “ (2002) 8 SCC 146**. In our view this judgment will have no application to the facts and circumstances of the present case and rather the latter judgments of the Honble Supreme Court delivered in the case of **GDA Vs. Balbir Singh “ (2004) 5 SCC 65 and (2005) 9 SCC 573** will squarely cover the issue involved in the present appeals. In view of this, we see no case for upgradation of the alternative relief.

6. Since the relief granted to the appellants can be said to be in consonance with the prayers made by them in the complaints, we are of the opinion that the appeals before this Commission are mis-conceived and are liable to be disposed of as such. However, the question as to which of the two reliefs, the appellant would like to realize and enforce and which can be actually granted to them on the ground is for the executing forum to decide where such a prayer is made. We make it clear that we are not expressing any opinion on the availability and/or feasibility of the two alternative reliefs granted to the appellants and it would be open for the executing court to take a view in that behalf. With these observations, the appeals stand disposed of.?

4. It would be pertinent to point out that appellants herein, did not challenge the impugned order during the period of limitation.

5. Main contention made by learned counsel for appellants is that only after dismissal of F.A. No.245 and 246 of 2008, right to challenge the impugned order accrued to the appellants. Thus, these appeals are not barred by limitation.

6. Other contention is that the complaints were filed before the State Commission, after two years from the date of cause of action and as such the same were time barred. It is further contended that no service of the complaints were effected upon the appellants in the State Commission.

7. Lastly, it is contended that respondents in these cases are defaulters, since they have not paid the full amount of the flats.

8. On the other hand, it has been contended by learned counsel for the respondents that appellants have no defence in these appeals, since they were proceeded ex parte before the State Commission. Moreover, respondents have already paid the amount of the flats in question, to which there is no rebuttal. The present appeals are hopelessly time barred.

9. It would be pertinent to point out that appellants were duly served before the State Commission but they had chosen to remain absent and did not contest the proceedings before the State Commission. Accordingly, the appellants were rightly proceeded ex parte.

10. As per appellants own case they have filed application under Order 9 Rule 13 of CPC before the State Commission for setting aside of the ex parte order dated 8.4.2008, that is, the impugned order. State Commission, vide order dated 21.1.2009, rejected that application.

11. In entire application under Order 9 Rule 13 of CPC , appellants have nowhere stated as to on which date they got the knowledge of the impugned order. Even in the grounds taken before this Commission, appellants have nowhere specifically mentioned as to on which date they got the knowledge of the impugned order.

12. Present appeals have been filed before this Commission on 27.11.2009, whereas the order under challenge is dated 8.4.2008. Thus, there is delay of 546 days in filing of the appeals and on the face of it, present appeals are hopelessly

time barred.

13. Interestingly, appellants, after dismissal of their application under Order 9 Rule 13 of CPC, remained silent for about 10 months.

14. Section 19 of the Consumer Protection Act, 1986, (for short as Act) prescribes the limitation during which appeal against the order made by State Commission can be filed, before the National Commission. This Section reads as under;

œ**19. Appeals** - Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of Section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period;

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent of the amount or rupees thirty-five thousand, whichever is less.?

15. It is well settled that œsufficient cause? for non appearance in each case, is a question of fact. Delhi High Court in **New Bank of India Vs. M/s Marvels (India): 93 (2001) DLT 558**, has held;

œNo doubt the words œsufficient cause? should receive liberal construction so as to advance substantial justice. However, when it is found that the applicants were most negligent in defending the case and their non-action and want of bonafide are clearly imputable, the Court would not help such a party. After all œsufficient cause? is an elastic expression for which no hard and fast guide-lines can be given and Court has to decide on the facts of each case as to whether the defendant who has suffered ex-parte decree has been able to satisfactorily show sufficient cause for non appearance and in

examining this aspect cumulative effect of all the relevant factors is to be seen.?

16. In Ram Lal and Ors. Vs. Rewa Coalfields Ltd., AIR 1962 Supreme Court 361, it has been observed;

œIt is, however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a discretionary jurisdiction vested in the Court by S.5. If sufficient cause is not proved nothing further has to be done; the application for condonation has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant.?

17. Similarly, in Oriental Insurance Co. Ltd. vs. Kailash Devi and Ors. AIR 1994 Punjab and Haryana 45, it has been laid down that;

œThere is no denying the fact that the expression sufficient cause should normally be construed liberally so as to advance substantial justice but that would be in a case where no negligence or inaction or want of bona fide is imputable to the applicant. The discretion to condone the delay is to be exercised judicially i.e. one of is not to be swayed by sympathy or benevolence.?

18. In œR.B. Ramlingam Vs. R.B. Bhavaneshwari, 2009 (2) Scale 108?, Supreme Court has been observed;

œWe hold that in each and every case the Court has to examine whether delay in filing the special appeal leave petitions stands properly explained. This is the basic test which needs to be applied. The true guide is whether

the petitioner has acted with reasonable diligence in the prosecution of his appeal/petition.?

19. Recently, Supreme Court in **œAnshul Aggarwal vs. New Okhla Industrial Development Authority, IV (2011) CPJ 63 (SC)?** has laid down that;

œIt is also apposite to observe that while deciding an application filed in such cases for condonation of delay, the Court has to keep in mind that the special period of limitation has been prescribed under the Consumer Protection Act, 1986 for filing appeals and revisions in consumer matters and the object of expeditious adjudication of the consumer disputes will get defeated if this Court was to entertain highly belated petitions filed against the orders of the consumer Foras.?

20. Since, appellants instead of filing appeal against the ex parte judgement of the State Commission, had chosen to seek wrong remedy by filing application under Order 9 Rule 13 of CPC for setting aside the ex parte order, despite the fact, that there is no provision under the Act for recall or review of any order passed by State Commission, then appellants in these circumstances shall have to suffer the natural consequences.

21. In this context, it is pertinent to refer to a judgement of the Supreme Court in **M/s. Advance Scientific Equipment Ltd. and Anr. Vs. West Bengal Pharma and Photochemical Development Corporation Ltd. (Appeal (Civil) Nos.17068 - 17069/2010, decided on 9 July 2010)** wherein it observed inter alia, as under:-

".We are further of the view that the petitioners' venture of filing petition under Article 227 of the Constitution was clearly an abuse of the process of the Court and the High Court ought not to have entertained the petition even for a single day because an effective alternative remedy was available to the petitioner under Section 23 of the Act and the orders passed by the State Commission did not suffer from lack of jurisdiction".

22. Appellants in these cases want to have the cake and eat it to, since respondents have paid the entire consideration of the flats in question, but still they are without any roof. Appellants are having the flats as well as the

amount deposited by the respondents with them. Under these circumstances, it appears that the intention of the appellants is to, grab the hard earned money of the respondents and not to give them flats.

23. In Ravinder Kaur Vs. Ashok Kumar, AIR 2004 SC 904, Apex Court observed;

œCourts of law should be careful enough to see through such diabolical plans of the judgment debtor to deny the decree holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forum only encourage frivolous and cantankerous litigations causing laws delay and bringing bad name to the judicial system.

24. Apex Court in Ramrameshwari Devi and Ors. Vs. Nirmala Devi and Ors., Civil Appeal Nos.4912-4913 of 2011 decided on July 4, 2011 has observed ;

œ45. We are clearly of the view that unless we ensure that wrong “doers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that courts otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

46. Usually the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits.

47. If an ex-parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

48. It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex-parte injunction orders or stay orders may not find encouragement. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In Swaran Singh Vs. State of Punjab (2000) 5 SCC 668 this court was constrained to observe that perjury has become a way of life in our courts.

49. It is a typical example how a litigation proceeds and continues and in the end there is a profit for the wrongdoers.

50. Learned Amicus articulated common mans general impression about litigation in following words :

œMake any false averment, conceal any fact, raise any plea, produce any false document, deny any genuine document, it will successfully stall the litigation, and in any case, delay the matter endlessly. The other party will be coerced into a settlement which will be profitable for me and the probability of the court ordering prosecution for perjury is less than that of meeting with an accident while crossing the road.?

25. In our opinion, the present appeals are nothing but a gross abuse of process of law and the first appeals are totally false, frivolous and bogus one, which are required to be dismissed with punitive costs of Rs.60,000/-. Accordingly, we dismiss the present appeals with costs of Rs.60,000/- (Rupees sixty thousand only).

26. Out of the costs imposed upon the appellants, Rs.20,000/- Rupees twenty thousand only) be paid to the each respondents by way of demand draft in their respective names. Remaining costs of Rs.20,000/- (Rupees twenty thousand only) be deposited by way of demand draft in the name of æConsumer Legal Aid Account? of this Commission, within one month from today.

27. In case, appellants fail to deposit the aforesaid costs within the prescribed period, they shall also be liable to pay interest @ 9% p.a., till realization.

28. Costs awarded to the respondents shall be paid, only after expiry of the period of appeal or revision.

29. List on 20th April, 2012 for compliance.

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